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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 COMMUNITY ASSOCIATION FOR  
9 RESTORATION OF THE ENVIRONMENT  
10 (CARE), a Washington nonprofit  
11 corporation,

12 Plaintiff,

13 v.

14 HENRY BOSMA DAIRY, a  
15 Washington proprietorship, aka  
16 HANK BOSMA DAIRY, aka BOSMA  
17 DAIRY, aka H & M DAIRY, aka H  
18 & S BOSMA DAIRY, aka B & M  
19 DAIRY; LIBERTY DAIRY, a  
20 Washington proprietorship;  
21 HENRY BOSMA, owner and  
22 operator of HENRY BOSMA DAIRY  
23 and LIBERTY DAIRY; and BOSMA  
24 ENTERPRISES, a Washington  
25 corporation,

26 Defendants.

NO. CY-98-3011-EFS

**FINDINGS OF FACTS AND  
CONCLUSIONS OF LAW**

21 This case was tried to the Court to determine liability on June  
22 1, 1999, and concluded on June 15, 1999. In a pre-trial ruling the  
23 Court had bifurcated the issues of liability and penalties. Plaintiff  
24 Community Association for Restoration of the Environment (CARE) was  
25 represented by Charles M. Tebbutt and Elizabeth Mitchell of Western  
26 Environmental Law Center, and Richard D. Eymann of Feltman, Gebhardt,

1 Eymann & Jones. Defendants Henry Bosma Dairy, Liberty Dairy, Henry  
2 Bosma and Bosma Enterprises were represented by Jerry R. Neal of  
3 Preston Gates & Ellis, and John S. Moore of Velikanje, Moore & Shore.  
4 The Court having heard the evidence, and having considered the  
5 pleadings and the argument of counsel, now enters the following  
6 Findings of Fact and Conclusions of Law on the issue of liability.

#### 7 **I. BACKGROUND**

8 This suit is brought under the citizen suit provision of the  
9 Federal Water Pollution Control Act, Clean Water Act (CWA), 33 U.S.C.  
10 §§ 1251-1387, and the Washington Clean Water Act, R.C.W. § 90.48.  
11 Plaintiff CARE has alleged that Defendants (hereinafter Bosma) have  
12 discharged pollutants into the waters of the United States without a  
13 permit in violation of 33 U.S.C. § 1311, as well as with a National  
14 Pollution Discharge Elimination System (NPDES) permit in violation  
15 thereof, and continue to violate their NPDES permit, their Washington  
16 State General Dairy Permit (hereinafter included in the term NPDES),  
17 the CWA and Washington CWA by discharging animal manure wastes into  
18 the waters of the State.

19 Prior to commencement of trial, the Court resolved the following  
20 issues on summary judgment as a matter of law:

- 21 • The Defendants' dairies are Concentrated Animal Feedlot  
22 Operations (hereinafter CAFOs). As such, they are point sources  
23 subject to the NPDES permit requirement and cannot discharge  
24 animal wastes without a NPDES permit or in violation of the NPDES  
25 permit they eventually obtained. The CAFOs include not only the  
26 ground where the animals are confined, but also the lagoons as

1 well as the equipment which distributes and/or applies the animal  
2 waste produced at the confinement area to fields outside the  
3 animal confinement area. (Ct. Rec. 147, at 10.)

4 **Clarification of the Order Granting Partial Summary Judgement**

5 Bosma admits its Dairies are CAFOs and therefore, must  
6 obtain a NPDES permit. In order to do so, Bosma had to work with  
7 the SYCD and the NRCS to design a DWMP. This was done in 1998.  
8 A discharge in violation of the NPDES permit including a  
9 discharge as a result of a violation of the DWMP, is a violation  
10 of the CWA.

11 There are two approaches to the issue of what constitutes a  
12 discharge violation. First, this Court could broadly interpret a  
13 CAFO to include the confinement area, the milk production area,  
14 calf pens, as well as waste storage areas, waste and wastewater  
15 conveyances including pipes and ditches, storage ponds, and also,  
16 equipment used to collect, channel and apply the animal wastes  
17 and wastewater, for example, trucks, wheel lines, center pivot  
18 irrigation and spray guns. These are all integral parts of the  
19 CAFO and the disposition of the huge amounts of animal wastes and  
20 wastewater produced by it which pose a risk to the waters of the  
21 United States.

22 However, this Court believes that it is correct to define a  
23 CAFO as the confinement area including the milk production area,  
24 cow pens, feeding area, truck wash area, calf pens, and fields  
25 therein on which manure is stored and any ditches therein. The  
26 integral parts of the DWMP including all storage ponds and all

1 devices for conveyance to those ponds as well as all devices for  
2 application of animal wastes and wastewater would then be point  
3 sources. This would include, but not be limited to, trucks,  
4 wheel lines, center pivot irrigation, and spray guns. Any  
5 discharge therefrom would be a violation of the NPDES permit and  
6 the CWA. By "discharge therefrom", the Court means an  
7 overapplication of manure or animal wastewater in violation of  
8 the DWMP which causes a discharge to the waters of the United  
9 States. This would eliminate the possibility that the CAFOs'  
10 crop production fields would be included in the definition of the  
11 CAFO. If they were included, then, regardless of the cause or  
12 reason, any discharge from them to the waters of the United  
13 States would be considered a discharge from a point source. Such  
14 an interpretation would conflict with the explicit point source  
15 exception for irrigated runoff. See 33 U.S.C. § 1362(14)  
16 (excepting return flows from irrigated agriculture as point  
17 source). It is only where the overapplication of the manure or  
18 wastewater to those fields by the CAFO owner or operator or its  
19 agents is the cause of the discharge that there is a violation of  
20 the DWMP, NPDES permit and the CWA. See *Concerned Area Residents*  
21 *for the Environment v. Southview Farm*, 34 F.3d 114 , 115 (2nd Cir.  
22 1994). See, *infra*, the discussion regarding the manure deposits  
23 at Price/Kellum Road acreage.

- 24 • Plaintiff CARE can enforce the effluent limitations contained in  
25 Washington's "Dairy Farm National Pollution Discharge Elimination  
26

1 System and State Waste Discharge General Permit." (Ct. Rec. 147,  
2 at 12.)

- 3 • The applicable statute of limitations for discharge violations is  
4 five years and 60 days back from the filing of the Complaint.  
5 (Ct. Rec. 147, at 13.)

- 6 • Plaintiff CARE provided adequate pre-suit notice of its claims  
7 under 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.3. The Notice of  
8 Intent to Sue gave sufficient information to the recipients  
9 enabling them to identify the location of alleged discharges.  
10 The allegation in the Notice that wastewater from lagoons was  
11 entering Joint Drain 26.6 (hereinafter J.D. 26.6) was sufficient  
12 to enable the recipients to identify Bosma's lagoons as a source  
13 of discharge violations and was sufficiently similar to the  
14 claims of leaking lagoons that both the letter and spirit of 40  
15 C.F.R. § 135.3(a) were met. Accordingly, the Court had subject  
16 matter jurisdiction over the discharges alleged in the Notice.  
17 The Court also had subject matter jurisdiction over the alleged  
18 violations contained in "Appendix B" of the Complaint because  
19 those violations were sufficiently similar to those contained in  
20 the Notice. (Ct. Rec. 156.)

- 21 • The Court did not have jurisdiction over allegations of  
22 violations relating to Price/Kellum and Hanford Highway areas  
23 because the Notice of Intent to Sue contained no information  
24 which would enable the recipients to identify the acreage at  
25 Price/Kellum Road and Hanford Highway as locations of discharge  
26 violations as required by 40 C.F.R. § 135.3(a). This ruling was

1 limited to precluding the Plaintiff from seeking penalties for  
2 alleged discharge violations at these two locations. The Court  
3 expressed no opinion and thereby reserved ruling on whether or  
4 not evidence of manure wastes produced at the Bosma dairy farms  
5 and applied at these two locations by the Defendants was  
6 admissible at trial. (Ct. Rec. 156, at 16.) At trial, after  
7 there was undisputed evidence that the Price/Kellum Road acreage  
8 was included in the Dairies' Dairy Waste Management Plan as a  
9 location for application of manure, the Court allowed evidence of  
10 deposit of manure at that location in May of 1998.

11 **A. Summary of the Court's Findings and Conclusions**

12 For the purpose of establishing a CWA violation, J.D. 26.6, the  
13 Sunnyside Valley Irrigation District (SVID) Canal and the Yakima River  
14 are "waters of the United States." Any discharge of pollutants by a  
15 CAFO into these waters is a violation of the CWA.

16 The Court affirms it has subject matter jurisdiction to hear this  
17 case since the evidence taken at trial confirms that the information  
18 provided by CARE to the recipients in the pre-suit notice was  
19 sufficient to enable them to identify the locations and dates of the  
20 alleged discharges.

21 The claimed violations of the CWA present a federal question and  
22 give the Court jurisdiction under 28 U.S.C. § 1331, and specifically  
23 33 U.S.C. § 1365(a). Additionally, the complaint contained good faith  
24 allegations of continuing violations and a reasonable likelihood of  
25 recurrent violations which met the *Gwaltney* test for retention of  
26 jurisdiction.

1           The Court finds that CARE, by and through its  
2 representatives Helen Reddout and Shari Conant, has standing to sue  
3 the Defendants. CARE established (1) an injury in fact, (2) an injury  
4 that is traceable to Bosma, and (3) a redressible injury.

5           At trial, CARE proved that as of the date of the filing of the  
6 complaint, January 15, 1998, there was a continuing violation and a  
7 reasonable likelihood of recurrent violations of the following: (1)  
8 discharges of wastewater from the truck wash to J.D. 26.6, (2)  
9 misapplication or overapplication of animal wastewaters to the 14.3  
10 acre field which would flow down the slope east into J.D. 26.6, and  
11 (3) a long history of repeated violations resulting from discharges to  
12 J.D. 26.6 and the Canal due to operation and maintenance of the  
13 Dairies. Accordingly, the Court has Article III jurisdiction. CARE  
14 failed to prove continuing violations or reasonable likelihood of  
15 recurrent violations relating to Defendants' operating without an  
16 NPDES permit and to seepage and capacity of the storage ponds.

17           Plaintiff established 15 specific violations of the CWA by  
18 proving Defendants are persons who discharged or added a pollutant  
19 from a point source into "waters of the Untied States" in violation of  
20 their NPDES permit. By the terms of the CWA, Bosma is strictly liable  
21 for these violations. The Court finds the Washington Dairy Nutrient  
22 Management Act of 1998, R.C.W. § 90.64.030, whatever it's legal  
23 efficacy, does not immunize Defendants from violations of the CWA and  
24 NPDES permit since Bosma was not in compliance with his Dairy Waste  
25 Management Plan nor with the NPDES permit. There is no interpretation  
26 of the statute which would shield Bosma from a citizen suit for

1 violations of the CWA. Penalties will be considered in the next phase  
2 of the trial on a date to be set by the Court.

3 **B. Water Quality Legislation and Congress**

4 Congressional efforts to deal with the pollution of the waters of  
5 the United States has a long history. The Refuse Act of 1899  
6 prohibited the discharge of any "refuse" without a permit from the  
7 Secretary of Army (Corp of Engineers) with enforcement by both  
8 criminal and civil sanctions. See 33 U.S.C. § 407 (superseded by the  
9 Federal Water Pollution Control Act Amendments of 1972). According to  
10 the report of the Senate Public Works Committee, that authority was  
11 ignored until June 1, 1971. See S. REP. No. 92-414, at 5 (1972),  
12 *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672. In 1948, water pollution  
13 legislation was enacted with the lead given to the states and support  
14 provided by federal agencies. See Pub. L. No. 80-845, 62 Stat. 11555.  
15 National recognition of water pollution increased gradually in the  
16 1950's and 1960's as additional sources of water pollution were  
17 identified.

18 In 1956, and again in 1965, Congress passed additional  
19 legislation on the subject of water pollution to the navigable waters  
20 of the United States. In 1970, the federal agency chosen to  
21 administer the federal portion of the program was the Environmental  
22 Protection Agency. See S. REP. No. 92-414, at 1-3 (1972), *reprinted in*  
23 1972 U.S.C.C.A.N. 3668, 3669-3670 (general history). The Senate  
24 Committee on Public Works conducted a two-year study and concluded  
25 "[t]hat the national effort to abet and control water pollution has  
26 been inadequate in every vital aspect." S. R EP. No. 92-414, at 7



1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674. It expressed  
2 concerns that the navigable waters of the United States were severely  
3 polluted, specifically mentioning rivers which were being used as  
4 waste treatment systems, and found that use unacceptable. *See id.*  
5 The Water Pollution Control Act Amendments in 1971 included the NPDES  
6 permit system and the right of citizens to file civil suits for  
7 violations of that Act. *See id.* at 69 (NPDES), 79 (citizen suits).  
8 The citizens were required to first serve a Notice of Intent to file  
9 such action on the designated federal and state agencies and the  
10 alleged polluter. *See id.* at 79. The citizens then had to wait 60  
11 days. *See id.* This waiting period was required by Congress to allow  
12 the parties to confer regarding the alleged violations, conciliate  
13 their differences and to allow the alleged violator to correct those  
14 alleged violations. Those Amendments also required the EPA  
15 Administrator to establish national standards of performance and one  
16 of the 28 was "dairy product processing." *Id.* at 58.

17 These comprehensive revisions of the National Water Quality  
18 Policy contained in the Water Pollution Control Act Amendments of  
19 1972 were so important to Congress that they enacted them over the  
20 President's veto. *See S. REP. No. 95-370, at 1 (1977), reprinted in*  
21 *1977 U.S.C.C.A.N. 4326, 4327.*

22 By the 1970's, intensive confinement of dairy cows was  
23 increasing. In supplemental views in the record of the Senate Public  
24 Works Committee, Senator Robert Dole said,

25 Animal and poultry waste, until recent years, has not been  
26 considered a major pollutant.... The picture has changed  
dramatically, however, as development of intensive livestock

1 and poultry production on feedlots and in modern buildings  
2 has created massive concentrations of manure in small areas.  
The recycling capacity of the soil and plant cover has been  
surpassed.

3 . . . . .

4 The present situation and the outlook for future  
5 developments in livestock and poultry production show that  
6 waste management systems are required to prevent waste  
generated in concentrated production areas from causing  
serious harm to surface and ground waters.

7 S. REP. NO. 92-414, at 100 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668,  
8 3761.

9 In the years following Senator Dole's remarks, the number of  
10 dairies adopting intensive confinement procedures for the production  
11 of milk increased. One article observed, "[t]he character of  
12 livestock production in many parts of the world, however, is changing  
13 rapidly and dramatically. Economies of scale, specialization, and  
14 regional concentration in all major livestock production sectors have  
15 fueled a trend toward fewer, larger operations that confine thousands  
16 of animals on limited acreage." Larry C. Frarey and Staci J. Pratt,  
17 *Environmental Regulation of Livestock Production Operations*, 9 NAT.  
18 RESOURCES & ENV'T. 8, 8 (1995); *see also* U.S. General Accounting Office  
19 Pub. No. GAO/RCED-95-200BR, *Animal Agriculture: Information on Waste*  
20 *Management and Water Quality Issues* 60 (1995).

21 In 1977, the Senate Committee on Environment and Public Works in  
22 Senate Report 95-370, discussed a variety of amendments to the 1972  
23 legislation. *See* S. REP. NO. 95-370 (1977), *reprinted in* 1977  
24 U.S.C.C.A.N. 4326. These ultimately became the Clean Water Act of  
25 1977. As enacted, the CWA contained an exemption for permit  
26

1 requirements for discharges composed entirely of return flows from  
2 irrigated agriculture. See 33 U.S.C. § 1362(14). No permit was  
3 required under the NPDES **IF** discharges were composed **ENTIRELY** of  
4 return flow from irrigated agriculture. See 33 U.S.C. § 1342(1)(1)  
5 (emphasis added).

6 In 1995, there was an effort in the House of Representatives to  
7 amend the Clean Water Act by adding to Section 319 the following: "(Q)  
8 AGRICULTURAL INPUTS. - FOR THE PURPOSES OF THIS ACT, ANY LAND  
9 APPLICATION OF AGRICULTURAL INPUTS, INCLUDING LIVESTOCK MANURE, SHALL  
10 NOT BE CONSIDERED A POINT SOURCE AND SHALL BE SUBJECT TO ENFORCEMENT  
11 ONLY UNDER THIS SECTION" (as a non-point source). See H.R. 961, 104<sup>th</sup>  
12 Cong. (1995) (unenacted) (parenthetical added). The 104<sup>th</sup> Congress  
13 took no action on House Bill 961. Had this amendment passed, land  
14 application of manure would have been regulated as a non-point source  
15 in 33 U.S.C. § 1329.<sup>1</sup> Though the CWA has been amended since its  
16 enactment in 1972, Congress' goal remains the same--to eliminate the  
17 discharge of pollutants into the navigable water so the United States.  
18 See 33 U.S.C. § 1251.

## 19 **C. State and Local Government Involvement**

### 20 **1. Role of Washington Department of Ecology (WADOE)**

21 In Washington, dairies are regulated by a General Dairy Permit  
22 and a Dairy Waste Management Plan. Washington is a delegated NPDES  
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24 <sup>1</sup> See Jeff L. Todd, Comment, *Environmental Law: The Clean Water Act*  
25 *- Understanding When a Concentrated Animal Feeding Operation Should*  
26 *Obtain an NPDES Permit*, 49 OKLA. L. REV. 481, 505 (1996).

1 permit state which has issued its own general permit. 33 U.S.C. §  
2 1342(b) allows individual states to adopt and administer NPDES  
3 programs rather than the EPA. States desiring to administer their own  
4 program must develop laws creating and regulating a Dairy Waste  
5 Management Program. The State of Washington has delegated regulatory  
6 authority to the Department of Ecology ("WADOE") to "[a]dminister and  
7 enforce national pollutant discharge elimination system permits for  
8 operators of concentrated dairy animal feeding operations, where  
9 required by federal regulations and state laws or upon request of a  
10 dairy producer." WASH. REV. CODE § 90.64.050(1)(e). Pursuant to RCW  
11 90.64.050(1), the WADOE also has the duties of identifying existing or  
12 potential water quality problems resulting from dairy farms;  
13 inspecting a dairy farm upon the request of a dairy producer;  
14 receiving, processing, and verifying complaints concerning discharge  
15 of pollutants from all dairy farms; determining if a dairy-related  
16 water quality problem requires immediate corrective action; and,  
17 encouraging communication and cooperation between local department  
18 personnel and the appropriate conservation district personnel. See  
19 WASH. REV. CODE § 90.64.050(1).

20 WADOE also maintains the lead enforcement responsibility which it  
21 cannot delegate. See WASH. REV. CODE § 90.64.050(1)(d) & (2). Pursuant  
22 to its statutory authority, WADOE has promulgated rules governing the  
23 National Pollutant Discharge Elimination System Permit Program, WAC  
24 173-220, and Waste Discharge General Permit Program, WASH. ADMIN. CODE  
25 § 173-226.

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2 Pursuant to federally regulated authority, WADOE has adopted a  
3 "Dairy Farm National Pollutant Discharge Elimination System and State  
4 Waste Discharge General Permit" (Washington general dairy permit)  
5 which it issues to CAFOs consisting of dairy operations. See WASH.  
6 ADMIN. CODE §§ 173-220-010, 173-226-010. WASH. ADMIN. CODE § 173-226-  
7 010 authorizes individual or general NPDES permits. Dairy operations  
8 that require site specific conditions to protect water quality are  
9 issued an individual permit. Under WASH. ADMIN. CODE § 173-220,  
10 permits are issued "designed to satisfy the requirements for discharge  
11 permits under Sections 307 and 402(b) of the federal Water Pollution  
12 Control Act (33 U.S.C. § 1251) and the state law governing water  
13 pollution control." WASH. ADMIN. CODE § 173-226-010.

## 14 **2. Role of Conservation District:**

15 Pursuant to RCW 90.64.070(1), the local conservation district has  
16 the following duties, contingent upon the availability of funding and  
17 resources to implement a dairy nutrient management program:

18 (a) Provide technical assistance to the department in  
19 identifying and correcting existing water quality problems  
20 resulting from dairy farms through implementation of the  
inspection program in RCW 90.64.023;

21 (b) Immediately refer complaints received from the public  
regarding discharge of pollutants to the department;

22 (c) Encourage communication and cooperation between the  
23 conservation district personnel and local department  
personnel;

24 (d) Provide technical assistance to dairy producers in  
25 developing and implementing a dairy nutrient management  
26 plan; and

1 (e) Review, approve, and certify dairy nutrient management  
2 plans that meet the minimum standards developed under this  
chapter.

3 WASH. REV. CODE § 90.64.070(1).

4 The local conservation district in this case is the South Yakima  
5 Conservation District (SYCD). WADOE referred Bosma to the SYCD for  
6 technical assistance in developing a Dairy Waste Management Plan  
7 (DWMP), a requirement of the NPDES permit.

## 8 **II. JURISDICTION AND STANDING**

9 In a pre-trial ruling, the Court held that it had subject matter  
10 jurisdiction over the claims in the Complaint filed by CARE. (Ct. Rec.  
11 156). This was based on its finding that the pre-suit notice sent by  
12 CARE to Bosma Dairy and the appropriate governmental agencies as  
13 required by 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.3 gave sufficient  
14 information to those recipients enabling them to identify the dates  
15 and the locations of the alleged discharges.

### 16 **A. Subject Matter Jurisdiction**

17 The evidence taken at trial confirms that the information  
18 provided by CARE to the recipients in the pre-suit notice was  
19 sufficient to enable them to identify the locations of the alleged  
20 discharges. All the discharges alleged in the pre-suit notice and in  
21 Appendix B to the Complaint were either to Joint Drain 26.6 (J.D.  
22 26.6) or to the Sunnyside Irrigation District Canal (Canal). J.D.  
23 26.6 runs south along the northeastern border of Bosma's property. At  
24 Kirks Road it crosses under the road going southwest to the slope  
25 below the 14.3 acre field and then south to the Canal. At the Canal  
26 there is a diversion box enabling the SVID to divert the water under

1 the Canal where it would continue down to the Granger Drain and into  
2 the Yakima River or into the Canal itself. <sup>2</sup> The Court made a pre-trial  
3 visit to the Bosma Dairy in the company of lawyers for each party.  
4 J.D. 26.6 can be walked from its southern point on Bosma's property to  
5 the northern point on Bosma's property in 15 to 20 minutes. Because  
6 of the extensive WADOE history of complaints and verified discharges  
7 into J.D. 26.6 by Bosma, both WADOE and Bosma were quite familiar with  
8 the location and course of J.D. 26.6 as it ran through Bosma's  
9 property.

10 Bosma had a long history of contacts with WADOE regarding  
11 complaints of discharges and verified discharges. He had received  
12 Notices of Violation from WADOE which contained dates of alleged  
13 violations. Bosma had appealed some of these and had formal hearings  
14 followed by written findings which included dates of verified  
15 discharges. Additionally, after receiving the NPDES permit in early  
16 1997, Bosma had three additional discharges verified by WADOE and  
17 failed to file discharge reports as required by his NPDES permit.  
18 That failure made it more difficult for the citizen complainants to  
19 discover the dates of those discharges.

20 The Court reaffirms its ruling that the Notice of Intent to Sue  
21 was sufficient to give the Court subject matter jurisdiction.

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26 <sup>2</sup> See generally the discussion on navigable waters *infra*.

1 **B. Article III Jurisdictions**

2 **1. The Gwaltney Requirement**

3 The Supreme Court has recognized that citizen suits under 33  
4 U.S.C. § 1365(a) could not be based on wholly past violations. See  
5 *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484  
6 U.S. 49, 64 (1987), on remand, 844 F.2d 170 (4<sup>th</sup> Cir. 1988); *rev'd in*  
7 *part*, 890 F.2d 690 (4<sup>th</sup> Cir. 1989). There, the Court held that  
8 jurisdiction could be based on continuous or intermittent violations  
9 saying of an intermittent polluter, "one who violates permit  
10 limitations one month out of every three -- is just as much 'in  
11 violation' of the Act as a continuous violator." *Id.* at 63.

12 The case was then remanded to the Fourth Circuit to "review the  
13 district court's finding that citizen plaintiffs made a good faith  
14 allegation of ongoing violation sufficient to maintain jurisdiction:  
15 at 171. In *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*,  
16 844 F.2d 170 (4<sup>th</sup> Cir. 1988), the Court held that it was sufficient to  
17 make a good faith allegation of continuing or intermittent violations  
18 in order to give the Court initial jurisdiction, but at trial,  
19 Plaintiffs had to prove the ongoing violations are intermittent  
20 violations. See 844 F.2d at 171-72 . It held,

21 Citizen-plaintiffs may accomplish this either (1) by  
22 proving violations that continue on or after the  
23 date the complaint is filed, or (2) by adducing  
24 evidence from which a reasonable trier of fact could  
25 find a continuing likelihood of a recurrence in  
intermittent or sporadic violations. Intermittent  
or sporadic violations do not cease to be ongoing  
until the date when there is no real likelihood of  
repetition.

26 *Id.*



1 The Court then remanded the case to the district court for  
2 specific findings as to whether the citizen-plaintiff had proved the  
3 existence of intermittent or sporadic violations constituting an  
4 ongoing violation. *Id.* The Complaint filed by CARE contained good  
5 faith allegations that there were continuing violations by Bosma and  
6 that there was a reasonable likelihood of recurrent violations. This  
7 was sufficient to give the Court initial Article III jurisdiction.

## 8 **2. Standing and Mootness**

9 Bosma challenges CARE's standing to continue this action  
10 asserting that CARE cannot establish (1) an injury in fact (2) an  
11 injury that is traceable to Bosma, not some third party, and (3)  
12 redressible injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
13 561 (1992). The Article III requirement of a "case or controversy"  
14 requires that a party have standing to pursue or continue the  
15 litigation. *See* U.S. CONST. art. III, § II, cl. 1. "Mootness doctrine  
16 thus protects defendants from the maintenance of suit under the Clean  
17 Water Act based solely on violations wholly unconnected to any present  
18 or future wrongdoing, while it also protects plaintiffs from  
19 defendants who seek to evade sanctions by predictable 'protestations  
20 of repentance and reform.'" *Gwaltney*, 484 U.S. at 66-7 (quoting  
21 *United States v. Oregon State Medical Society*, 343 U.S. 326, 333  
22 (1952)). CARE brings this action asserting "representational  
23 standing." "Such 'representational standing' is appropriate where 1)  
24 the organization's members would have standing to sue on their own, 2)  
25 the interests the organization seeks to protect are germane to its  
26 purpose, and 3) neither the claim asserted nor the relief requested

1 requires individual participation by its members." *Public Interest*  
2 *Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*,  
3 913 F.2d 64, 70 (3<sup>rd</sup> Cir. 1990) (Aldisert, J., concurring).

4 Within the citizen suit provision of the CWA, a "citizen"  
5 entitled to bring suit is defined as "a person or persons having an  
6 interest which is or may be adversely affected." 33 U.S.C. § 1365(g).  
7 In order to have individual standing, "Art. III requires the party who  
8 invokes the court's authority to 'show that he personally has suffered  
9 some actual or threatened injury as a result of the putatively illegal  
10 conduct of the defendant,' . . . and that the injury 'fairly can be  
11 traced to the challenged action' and 'is likely to be redressed by a  
12 favorable decision.'" *Valley Forge Christian College v. Americans*  
13 *United for Separation of Church and State*, 454 U.S. 464, 472 (1982)  
14 (citations omitted).

15 In *Powell Duffryn*, the defendant made the same argument: the  
16 plaintiffs lacked standing to advance their claims. *See Powell*  
17 *Duffryn*, 913 F.2d at 64. The standees in *Powell Duffryn* complained of  
18 the same loss of recreational interests about which both Shari Conant  
19 and Helen Reddout complained. *See id.* The *Powell Duffryn* standees  
20 indicated that their recreational interests of hiking, bird watching,  
21 jogging and bicycling along the shores of the polluted body of water  
22 were adversely affected and diminished by the pollution. *See id.* at  
23 71. No one actually boated, fished, or swam in the water because of  
24 its foulness, but they indicated they would if the water were cleaner.  
25 *See id.* Affidavits containing those allegations were held sufficient  
26 to satisfy the requirements of Article III. *See id.* Harm to

1 aesthetic and recreational interests is sufficient to confer standing.  
2 See *id.*, see *Aero Club v. Morton*, 405 U.S. 727, at 753 (1972). "These  
3 injuries need not be large, an 'identifiable trifle' will suffice."  
4 *Id.* at 71 (quoting *United States v. Students Challenging Regulatory*  
5 *Agency Procedures (SCRAP)*), 412 U.S. 669, 689 n. 14 (1973).

6 **a. Injury in Fact**

7 Shari Conant is a member of CARE. She works as an office manager  
8 in the area and with her husband owns 40 acres of apples and pear  
9 trees in the Yakima Valley. While Shari Conant has not rafted in the  
10 Yakima River, she would like to and does not because of the pollution  
11 in the Yakima River south of the Granger Drain, the Drain into which  
12 J.D. 26.6 flows. She has hiked along the Yakima River north of  
13 Granger Drain. Her recreation includes bird watching and photography  
14 north of Granger in the Toppenish area. The pollution in the Yakima  
15 River has prevented her from engaging in activities along the Yakima  
16 that she would normally do in a river community in which she lived.  
17 Her route to work takes her across the Yakima River at a point just  
18 downstream from the Granger Drain. She has noticed an increase in the  
19 discoloration and odor of the river in the last few years. Shari  
20 Conant believes that the ditches and drains of the SVID are a series  
21 of interconnected waterways which contribute to the pollution of the  
22 Yakima River. It is her belief based on what she has read, seen and  
23 smelled that it is not safe to recreate in and along the Yakima River  
24 due to the various entities that contribute pollution to its waters.

25 Helen Reddout is a 46-year resident of the Yakima River area.  
26 She has observed the Yakima River since 1952. Since 1962, she and her

1 husband have owned 75 acres of orchard at Cherry Hill with some 10-12  
2 acres of it along the Yakima River. This property is south of and  
3 down-river from the Granger Drain. When water is low, their orchard  
4 water is pumped from the Granger Drain. That Drain water clogs their  
5 pumps with manure wastewater in spite of filtering. In years past,  
6 she and her family liked to picnic at the back end of the orchard  
7 along the Yakima River. They would wade in it, float in it, gather  
8 wild flowers and vegetables as well as bird watch along it. Her  
9 husband used to fish the Yakima River regularly in the 1950's and  
10 1960's. In recent years when they went there, the river smelled like  
11 manure, they saw foam on the river and they found dried manure along  
12 the banks. This has discouraged recreation by the family in and along  
13 the Yakima River which is polluted by a variety of sources.

14 The Reddout family lives on 1 ½ acres on Hudson Road in the  
15 Liberty area of the Yakima Valley. At their home on Hudson Road, the  
16 Reddouts use water from the laterals from the Canal for irrigation.  
17 Helen Reddout believes that pollution to J.D. 26.6 which enters the  
18 Canal pollutes water in the laterals from the Canal and has reached  
19 the lateral which supplies water to their property.

20 In addition to Helen Reddout's commercial interests being  
21 adversely affected, both Helen Reddout and Shari Conant have proven  
22 that their recreational and aesthetic interests involving the Yakima  
23 River have been severely limited due to the presence of manure flowing  
24 into the Yakima River from Granger Drain. These harms are sufficient  
25 to establish an injury in fact.  
26

1 Just as the Court in *Powell Duffryn* found that the interests  
2 asserted by the plaintiffs were more than identifiable trifles, so  
3 does this Court find that the interests asserted by Shari Conant and  
4 Helen Reddout are more than trifles. They have suffered injury-in-  
5 fact.

6 **b. Traceability**

7 It is Bosma's position that CARE will be unable to prove that the  
8 pollutants allegedly found in the Yakima River came from Bosma. The  
9 gist of this defense is that even if there was pollution discharged to  
10 J.D. 26.6, and even if it was discharged into the Sunnyside Canal, it  
11 could not be traced to Bosma because the water of the Canal during  
12 irrigation season is applied to other farms along the way and the  
13 alleged discharge of pollutants may never even reach the Yakima River.  
14 Even if it did reach the river, there are numerous other sources of  
15 fecals polluting the waters which are unrelated to Bosma. <sup>3</sup> Bosma says  
16 nothing about the traceability for discharges into J.D. 26.6 during  
17 the winter months when it is diverted by the SVID under the then dry  
18 Canal to the south into the Granger Drain and from it into the Yakima  
19 River. However, CARE does not have to prove that Bosma was the only  
20 polluter nor the exact amount of pollution by Bosma.

21 The requirement that plaintiff's injury be "fairly  
22 traceable" to the defendant's conduct does not mean that

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23 <sup>3</sup> See concurring opinion of Aldisert J., in *Powell v. Duffryn*,  
24 supra, in which he noted that the waters in that case were heavily  
25 polluted from a variety of sources but agreed that plaintiff's members  
26 had standing. at 87, 89.

1 plaintiffs must show to a scientific certainty that  
2 defendant's effluent, and the defendants effluent alone,  
3 caused the precise harm suffered by the plaintiffs. A  
4 plaintiff need not prove causation with absolute scientific  
5 rigor to defeat a motion for summary judgment. The "fairly  
6 traceable" requirement of the *Valley Forge* test is not  
7 equivalent to a requirement of tort causation.

8  
9 *Powell Duffryn*, 913 F.2d at 72 (citations and footnote omitted).

10 The Fourth Circuit Court of Appeals stated in *National Resources*  
11 *Defense Counsel, Inc. v. Watkins*, that even though

12 it seems highly probable that polluters other than the DOE  
13 substantially contribute to the current polluted state of  
14 the Savannah River. This fact . . . does not deprive the  
15 affiants . . . of standing to sue DOE if it can be shown  
16 that the K reactor discharge contributes to the pollution  
17 that interferes with the affiants' use of the Savannah  
18 River.

19 954 F.2d 974, 980 (4<sup>th</sup> Cir. 1992).

20 Both Helen Reddout and Shari Conant have proven that their  
21 recreational and aesthetic interests involving the Yakima River are  
22 severely limited by the presence of manure flowing in the Yakima River  
23 from the Granger Drain. The Granger Drain empties J.D. 26.6 into the  
24 Yakima River. Bosma has discharged manure and animal wastewater into  
25 J.D. 26.6 and there is a likelihood that he will continue to do so  
26 resulting in an adverse affect upon the ability of Shari Conant and  
Helen Reddout and their families to use the Yakima River. Bosma  
points to the fact that others also pollute the Yakima River by  
discharging animal wastewater and manure into it. That fact is not in  
dispute. However, it offers no shield to Bosma for his discharges  
into the "waters of the United States": J.D. 26.6 and the Canal, both  
of which empty into the Yakima River are included in the definition of

1 "waters of the United States." <sup>4</sup> CARE and its standees do not have to  
2 sue every polluter of J.D. 26.6, the Canal, and the Yakima River. It  
3 is sufficient if they show that the pollution by Bosma has caused a  
4 part of their injury. "The size of the injury is not germane to  
5 standing analysis." *Powell Duffryn*, 913 F.2d at 72 n.8 (citing *SCRAP*,  
6 412 U.S. at 689 n.14.) Nor must Shari Conant and Helen Reddout show  
7 that the manure and animal wastes that they encountered along the  
8 Yakima River or in the Canal were discharged by Bosma. That kind of  
9 "scientific certainty" is not required in CWA actions. See *id.* at 72.  
10 CAFOs like Bosma are strictly liable for their discharges. The  
11 standees need not prove causation as if this were a tort action. It  
12 is not. The plaintiffs themselves can recover no damages for their  
13 personal injury. See 33 U.S.C. § 1365(a)&(d) (stating citizens  
14 remedies limited to injunctive relief and civil penalties under  
15 section 1319(d), and costs of litigation including attorney and expert  
16 witness fees); 33 U.S.C. § 1319(d) (civil penalties); *Gwaltney*, 484  
17 U.S. at 53 (holding civil penalties payable to United States  
18 Treasury).

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20 <sup>4</sup> See the discussion of navigable waters *infra*; see also *United*  
21 *States v. Velsicol Chemical Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976)  
22 (holding that where the defendant knew or should have known that city  
23 sewers, into which it discharged pollutants, led directly into the  
24 Mississippi River, that was sufficient to constitute a discharge into  
25 "waters of the United States" as that term is used in the Clean Water  
26 Act).

1 Bosma has admitted discharge violations. The WADOE records  
2 contain verified discharges by Bosma to J.D. 26.6 and the Canal. The  
3 testimony of Ray and Steve Butler proved the ongoing discharge  
4 violations by Bosma in 1997, 1998, and 1999. The claims of injury to  
5 the recreational and aesthetic interests of Shari Conant and Helen  
6 Reddout are proven. Thus, they have traced their injury to the  
7 discharge violations by Bosma.

8 **c. Redressability**

9 Bosma believes that the CARE standees cannot demonstrate  
10 redressability of their injury because they declined to use the Yakima  
11 River in its polluted condition or complained that their recreational  
12 and aesthetic interests will continue to be limited by the existence  
13 of other polluters. Congress answered this by enunciating the purpose  
14 of the act which is to "restore and maintain the chemical, physical,  
15 and biological integrity of the Nation's waters," and further by  
16 making elimination of pollution of the waters of the United States its  
17 national goal. 33 U.S.C. § 1251(a). "Plaintiffs need not show that  
18 the waterway will be returned to pristine condition in order to  
19 satisfy the minimal requirements of Article III." *Powell Duffryn*, 913  
20 F.2d at 73. Bosma overlooks the deterrent effect on a polluter aware  
21 of the award of civil penalties in a citizen's suit brought for  
22 violation of the CWA. Other polluters will learn of those awards and  
23 will modify their behavior or face the potential for being defendants  
24 in citizen suits under the CWA and an award of civil penalties for  
25 their discharges in violation of the CWA. The Court concludes that  
26



1 CARE and its members have standing to bring this action and that this  
2 Court continues to have Article III jurisdiction.

### 3 III. WATERS OF THE UNITED STATES

4 These Findings of Fact are based on the Exhibits admitted prior  
5 to and during trial and testimony taken.

#### 6 A. Applicable Law

7 Waters of the United States or waters of the U.S.  
8 means:

9 (a) All waters which are currently used, were used  
10 in the past, or may be susceptible to use in  
11 interstate or foreign commerce, including all  
12 waters which are subject to the ebb and flow of  
13 the tide;

14 (b) All interstate waters, including interstate  
15 "wetlands;"

16 (c) All other waters such as intrastate lakes,  
17 rivers, streams (including intermittent streams),  
18 mudflats, sandflats, "wetlands," sloughs, prairie  
19 potholes, wet meadows, playa lakes, or natural  
20 ponds the use, degradation, or destruction of  
21 which would affect or could affect interstate or  
22 foreign commerce including any such waters:

23 (1) Which are or could be used by interstate  
24 or foreign travelers for recreational or  
25 other purposes;

26 (2) From which fish or shell fish are or  
could be taken and sold in interstate or  
foreign commerce; or

(3) Which are used or could be used for  
industrial purposes by industries in  
interstate commerce;

(d) All impoundments of waters otherwise defined  
as waters of the United States under this  
definition;

(e) Tributaries of waters identified in paragraphs  
(a) through (d) of this definition;

1 (f) The territorial sea; and

2 (g) "Wetlands" adjacent to waters (other than  
3 waters that are themselves wetlands) identified in  
4 paragraphs (a) through (f) of this definition.

5 40 C.F.R. § 122.2.

6 "'Surface waters of the state' means all waters defined as  
7 'waters of the United States' in 40 CFR § 122.2 that are within the  
8 boundaries of the state of Washington. This includes lakes, rivers,  
9 ponds, streams, inland waters, wetlands, ocean, bays, estuaries,  
10 sounds, and inlets." WASH. ADMIN. CODE § 173-220-030(21).

11 The Dairy Farm NPDES and State Waste Discharge General Permit  
12 issued to H & S Bosma Dairy and Liberty Dairy on January 15, 1998,  
13 contained a "FACILITY FACT SHEET." On that sheet, it was explicitly  
14 stated that processed wastewater was being discharged to ground water  
15 and surface water. The surface water body to which the wastewater was  
16 being discharged was identified as an unnamed drain of the Sunnyside  
17 Irrigation District which was specifically described in the "water  
18 class" category as "Class A." <sup>5</sup>

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19 <sup>5</sup> Washington law defines a "Class A" body of water as:

20 (2) Class A (excellent).

21 (a) General characteristic. Water quality of this class shall  
22 meet or exceed the requirements for all or substantially all  
23 uses.

24 (b) Characteristic uses. Characteristic uses shall include,  
25 but not be limited to, the following:

26 (i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport  
fishing, boating, and aesthetic enjoyment).

1 Discharges of pollutants into the "waters of the United States"  
2 are prohibited by the CWA. 33 U.S.C. § 1311(a). The "discharge of a  
3 pollutant" is "any addition of any pollutant to navigable waters from  
4 any point source." 33 U.S.C. § 1362(12)&(16). "Navigable waters" are  
5 "waters of the United States." 33 U.S.C. § 1362(7). The term  
6 "navigable waters" as used in the CWA is "to be given the broadest  
7 possible constitutional interpretation." *Leslie Salt Co. v. Froehlke*,  
8 578 F.2d 742, 755 (9<sup>th</sup> Cir. 1978). In *United States v. Saint Bernard*  
9 *Parish*, the Court held that a canal from which waters were  
10 occasionally pumped over a levee into adjoining wetlands which were  
11 connected by open water channels through the wetland to a bayou and  
12 the Mississippi River Gulf Outlet were tributaries of the Gulf and  
13 therefore was a "navigable body of water" within the meaning of  
14 "waters of the United States" as used in the Clean Water Act. See 589  
15 F. Supp. 617 (E.D. La. 1984). Accordingly, pollution of that canal  
16 was pollution of "waters of the United States" subjecting the polluter  
17 to sanctions.<sup>6</sup> Congress clearly intended the broadest possible

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19 (vi) Commerce and navigation.

20 WASH. ADMIN. CODE § 173-201A-030(2).

21 For "Class A" waters, "fecal coliform organism levels shall both not  
22 exceed a geometric mean value of 100 colonies/100 mL, and not have more  
23 than 10 percent of all samples obtained for calculating the geometric  
24 mean value exceeding 200 colonies/100 mL." WASH. ADMIN. CODE § 173-201A-  
25 030(2)(c)(i)(A).

26 <sup>6</sup> See *Bailey v. United States Corp of Eng'rs*, 647 F. Supp. 44, 48

1 interpretation of the term "navigable waters" because it used that  
2 term with regard to its objective. When enacting the CWA, Congress  
3 stated,

4 The objective of this chapter is to restore and maintain the  
5 chemical, physical, and biological integrity of a Nation's  
6 waters. In order to achieve this objective it is hereby  
7 declared that, consistent with the revisions of this  
8 chapter--

9 (1) it is the national goal that discharge of pollutants  
10 into the navigable waters be eliminated by 1985[.]

11 33 U.S.C. § 1251(a)(1).

12 As the Court in *United States v. Ashland Oil and Transp. Co.*  
13 observed,

14 Other congressional concerns with water pollution which  
15 extend far beyond waters which are navigable in fact are §  
16 1254(n) dealing with studies of the effects of pollution  
17 upon estuaries and estuarial zones, § 1254(p), agricultural  
18 pollution, § 1254(q), studies of sewage in rural areas, and  
19 § 1255(b), demonstration projects for control of pollution  
20 and river basins.

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21 (D. Idaho 1986). The court in *Bailey* broadly construed the term  
22 "wetlands". See also, Final General NPDES Permit for Concentrated Animal  
23 Feeding Operations (CAFO) in Idaho Id-G-01-0000 (April, 1997) wherein the  
24 EPA, Region X, responded to objections to the proposed permit language  
25 regarding canals and laterals by saying,

26 Canals and laterals which empty into (or connect with) waters  
of the United States such as rivers, streams, lakes, etc. are  
themselves waters of the United States in accordance with the  
definition of waters of the United States in 40 CFR 122.2(e).  
As a result, discharges into canals and laterals are considered  
point source discharges which must be regulated under the NPDES  
permitting program.

62 Fed. Reg. 20177, 20180 (1997).

1 504 F.2d 1317, 1322 (6<sup>th</sup> Cir. 1974).

2 In recognizing the power of Congress seek to abate pollution  
3 under its interstate commerce powers the *Ashland* Court said,

4 It would, of course, make a mockery of those powers if its  
5 authority to control pollution was limited to the bed of the  
6 navigable stream itself. The tributaries which join to form  
7 the river could then be used as open sewers as far as  
8 federal regulation was concerned. The navigable part of the  
9 river could become a mere conduit for upstream waste.

10 *Id.* at 1326.

11 Similarly, in reaching its conclusion that the canal in its case  
12 was included within the definition of "waters of the United States,"  
13 the *Saint Bernard Parish* Court noted,

14 Congress intended to control both the discharge of  
15 pollutants directly into navigable waters and the discharge  
16 of pollutants into non-navigable tributaries which flow into  
17 the navigable waters. *Ashland, supra*. The scope of the  
18 Act's control to discharge into any waterway where any water  
19 which might flow therein could reasonably end up in any body  
20 of water, to which or in which there is some public  
21 interest. *United States v. Phelps Dodge Corp.*, 391 F.Supp.  
22 1181 (D. Ariz. 1975).

23 *Saint Bernard Parish*, 589 F. Supp. at 620.

24 The Ninth Circuit has also broadly interpreted the term "waters  
25 of the United States" under the Clean Water Act: "[w]e agree with the  
26 district court that Congress intended to create a very broad grant of  
jurisdiction in the Clean Water Act, extending to any aquatic features  
within the reach of the commerce clause power." *Leslie Salt Co. v.*  
*United States*, 896 F.2d 354, 357 (9<sup>th</sup> Cir. 1990).

#### 27 **B. Finding of Facts**

28 The SVID takes water out of the Yakima River at Parker Dam in the  
29 Spring of each year. That water runs through the Canal bringing water  
30

1 to the land serviced by the Canal. Water is taken from the Canal and  
2 applied to the land by the users. The water going back to the Canal  
3 through a series of returns is composed of water not used by  
4 irrigators and irrigation runoff. At three locations in the SVID,  
5 much of the water in the Canal is returned to the Yakima River. The  
6 remaining water in the Canal continues east and then is utilized by a  
7 different irrigation district.

8 J.D. 26.6 of the SVID is a drain that runs south from the ROZA  
9 Irrigation District along the east side of Bosma's property then  
10 southwest under Kirk's Road and then south through Bosma's property  
11 down to the Canal. The SVID has installed a weir box which measures  
12 the flow of this drain above the southwestern corner of Bosma's  
13 property. The drain then flows into a diversion box just at the  
14 northern edge of the Canal. At this box, the SVID can divert the  
15 water from this drain under the canal where it continues down to the  
16 Granger Drain which empties into the Yakima River. This is done in  
17 the winter months when the Canal is empty. During irrigation season,  
18 generally from mid-March to mid-October, J.D. 26.6 flows directly into  
19 the Canal.

20 In an attempt improve water quality to meet WADOE requirements,  
21 ROZA-Sunnyside Board of Joint Control (hereinafter "RSBOJC") adopted a  
22 Water Quality Policy. Consistent with this Policy, RSBJOC water  
23 quality personnel collect turbidity readings to measure water clarity.  
24 RSJBOC collect water quality samples from over 25 sites. During the  
25 irrigation season, the water quality samplings are taken biweekly and  
26 then only monthly during the non-irrigation season.

1 RSBJOC water quality sampling Site 1 measures the water quality  
2 of J.D. 26.6 above the Canal at the concrete intake and culvert which  
3 is at the base of the Bosma dairies. This measurement would include  
4 waters from J.D. 26.6 that flow from the Bosma dairies and the Cow  
5 Palace dairy that borders Bosma's on the east. For each sampling  
6 taken since June, 1997 through May, 1999, in which fecal coliform  
7 levels were tested, fecal coliform readings at Site 1 ranged between  
8 470 colonies/mL to 650,000 colonies/100mL--each reading above the  
9 state water quality standards of 100 colonies/100mL.

10 Ronald J. Shuck was the drainage supervisor for SVID and had  
11 worked there for many years. His deposition testimony was admitted at  
12 trial because of his unexpected death prior to trial. Mr. Shuck  
13 testified that he and his employees routinely inspected and maintained  
14 any joint drains of the SVID north of the Sunnyside Canal. This  
15 included J.D. 26.6 which is a joint drain of the ROZA Irrigation  
16 District and the SVID.

17 The SVID and ROZA Irrigation District in its amicus briefs argues  
18 against the classification of the waters in the Canal, laterals, and  
19 ditches as "waters of the United States" or even "surface waters of  
20 the State of Washington." However, "waters of the State" has been  
21 broadly interpreted by the Washington Attorney General to include  
22 canals, drains, waste ways and reservoirs of irrigation and drainage  
23 systems. See 4 Op. Att'y Gen. 6 (1969). The Court takes judicial  
24 notice that as recently as 1996, the Attorney General of Washington  
25 wrote to the regional counsel of the EPA Region X, citing cases which  
26

1 supported that earlier opinion of the Attorney General's office in the  
2 State of Washington.

3 Bosma does not dispute that the Yakima River falls within the  
4 definition of "waters of the United States." Nor at any time during  
5 the application process or after receiving the Dairy Farm NPDES and  
6 State Waste General Discharge Permit did Bosma ever challenge the  
7 classification of the receiving surface waters as "Class A."

8 The waters of J.D. 26.6 empty into the Canal and the Granger  
9 Drain and through them to the Yakima River. The Court further finds  
10 that the SVID has inspected and maintained J.D. 26.6 above the Canal  
11 as it twists through the Bosma Property.

12 **C. Conclusion of Law**

13 This Court concludes as a matter of law that J.D. 26.6, the Canal  
14 and the Yakima River are "waters of the United States" for the purpose  
15 of determining the issue of liability on claims of discharge in  
16 violation of the CWA. Accordingly, this Court concludes as a matter  
17 of law that any discharges by Bosma to J.D. 26.6 as it traverses his  
18 property are discharges to "waters of the United States."

19 **IV. THE BOSMA DAIRY AND THE LIBERTY DAIRY**

20 **A. History of Operation**

21 In 1973, Henry Bosma started a dairy with 300 dairy cows outside  
22 of the town of Zillah in Yakima County. In 1990, the Liberty Dairy  
23 was added. Defendants Henry Bosma, Henry Bosma Dairy, Liberty Dairy,  
24 and Bosma Enterprises, Inc. own and operate the Dairies at 1271 North  
25 Liberty Road and 5680 E. Zillah Road, Granger, Washington. Henry  
26 Bosma Dairy is sometimes referred to, and is the same as H & S Bosma



1 Dairy, Hank Bosma Dairy, and Bosma Dairy. Henrietta and Henry Bosma  
2 own and operate the dairies, and the land on which manure is stored,  
3 collected, and applied, as a sole proprietorship. Bosma and Liberty  
4 Dairies (jointly referred to as the Dairies) adjoin one another and  
5 are under common ownership. The Cow Palace owns the property that  
6 lies immediately to the east of the Bosma Dairy, north of Kirks Road,  
7 and south of East Zillah Drive. In February of 1996, Bosma leased 155  
8 acres of land at the northwest corner of the intersection Price and  
9 Kellum Road. That land was included in the Dairy Waste Management  
10 Plan (hereinafter DWMP) as acreage for application of animal wastes as  
11 fertilizer for crop production.

12 By 1998, according to the approved 1998 DWMP for the Bosma and  
13 Liberty Dairies submitted as part of the NPDES permit process, Bosma  
14 Dairy had 1,250 milking cows, 250 dry cows, and 750 heifers for a  
15 total of 2,250 cows while the adjoining Liberty Dairy had 2,100  
16 milking cows, 400 dry cows, and 500 heifers for a total of 3,000 cows,  
17 a combined total of 5,250 dairy cows. The cows are stabled or  
18 confined and fed or maintained at the Dairies for a total of 45 days  
19 or more in any 12 month period in pens or lots where crops,  
20 vegetation, forage growth, or post harvest residues are not sustained.  
21 Essentially, both dairies employ intensive confinement for thousands  
22 of dairy cows and are "concentrated animal feeding operations"  
23 (CAFOs). "'Concentrated animal feeding operation' means an 'animal  
24 feeding operation' which meets the criteria in Appendix B of this  
25 part, or which the Director designates under paragraph (c) of this  
26 section." 40 C.F.R. § 122.23(a)(3).

1 An "animal feeding operation" is defined as "a lot or facility  
2 (other than an aquatic animal production facility) where the following  
3 conditions are met:

- 4 (i) Animals (other than aquatic animals) have been, are, or  
5 will be stabled or confined and fed or maintained for a  
6 total of 45 days or more in any 12-month period, and  
7 (ii) Crops, vegetation forage growth, or post-harvest  
8 residues are not sustained in the normal growing season over  
9 any portion of the lot of facility.

10 40 C.F.R. § 122.23(b)(1).

11 An "animal feeding operation" is a CAFO under 40 C.F.R. § 122.23  
12 if it confines more than 700 mature dairy cattle (whether milk or dry  
13 cows) or 1,000 animal units. See 40 C.F.R. § 122.23(b)(3), 40 C.F.R.  
14 Pt. 122, App. B (a)(2)(10). As applied to an animal feeding  
15 operation, for dairies the term "animal unit" means the number of  
16 mature dairy cattle multiplied by 1.4. 40 C.F.R. Pt. 122, App. B. <sup>7</sup>

17 Using the formulae in the EPA regulations, 5250 dairy cows  
18 converts to 7,350 animal units (the number of dairy cows multiplied by

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19 <sup>7</sup> It is reported that one dairy cow will produce 82 pounds of wet  
20 manure per day. See Larry C. Frarey and Staci J. Pratt, *Environmental*  
21 *Regulation of Livestock Production Operations*, 9 NAT. RESOURCES & ENV'T. 8,  
22 8 (1995). With over 5,000 dairy cows as well as the wastewater from the  
23 milking area and runoff from other fields which could carry the manure  
24 into the waters of the United States, Bosma had a substantial amount of  
25 waste to manage. There were 500 acres specified in the DWMP for  
26 application of this manure. This acreage in the 1998 DWMP included all  
of the acreage at both dairies and acreage leased at the Northwest corner  
of intersection of Price and Kellum Roads, some four to five miles east.

1 1.4). See 40 C.F.R. Pt. 122, App. B(a). 1,000 animal units meets the  
2 test for qualification as a "concentrated animal feeding operation."  
3 See 40 C.F.R. Pt. 122, App. B.

4 As described in Defendant's Trial Brief (Ct. Rec. 159), these  
5 Dairies are in operation 24 hours a day, every day of the year, and  
6 employ 75 people. The cows are milked three times a day. The  
7 management of these dairy wastes is detailed in the 1998 DWMP. In  
8 summary, water used to cool the milk is recycled for use in cleaning  
9 the animals and milking area. It is then piped to areas where it  
10 separates into solids and liquids. It is after which pumped to  
11 storage ponds for storage during the winter months and application to  
12 crop fields during the growing season. Solid animal wastes are  
13 collected from various parts of the confinement area and sold to  
14 others as fertilizer, applied to Bosma crop production fields during  
15 the growing season, and mixed with straw for use as bedding for the  
16 animals. Both dairies presently use a common system of waste  
17 collection and disposal. In theory, the confinement area is bermed to  
18 channel storm water runoff and any wastewater to storage ponds.

19 J.D. 26.6 is a drain that runs south from an area at the ROZA  
20 Canal along the east side of the Dairies through a culvert under Kirks  
21 Road southwest and then south by Storage Ponds #1 and #2 to a SVID  
22 weir box and on to a SVID diversion box on the north side of the SVID  
23 Canal. In the winter months, J.D. 26.6 is diverted under the Canal and  
24 flows south to the Granger Drain and then into the Yakima River.  
25 During the growing season, it is diverted into the Canal as added  
26 water for irrigation. For years, Bosma used this drain as a conveyance

1 of animal wastewaters to the ponds south of Kirks Road despite being  
2 told in 1989 by WADOE officials to cease the use of J.D. 26.6 for that  
3 purpose.

4 Over the years, WADOE, which had responsibility for supervision  
5 and enforcement of the CWA and the NPDES permit process, had frequent  
6 contacts with Henry Bosma regarding discharges of animal wastewater to  
7 the waters of the United States and of the State of Washington from  
8 his Dairies and has issued a number of discharge violations to Bosma  
9 Dairy. By 1986, Bosma Dairy was under WADOE order to obtain a NPDES  
10 permit. In 1987, WADOE and Bosma Dairy entered into a Stipulation to  
11 resolve two 1984 discharge violations and the 1986 Order. In return  
12 for Bosma's agreement to pay a fine and to take other steps to avoid  
13 further discharges, the total fines were reduced and the order to  
14 apply for a NPDES permit was held in abeyance on condition that there  
15 would be no further discharges from the dairy.

16 In 1988, following a verified discharge of animal wastes from a  
17 spray gun, WADOE recommended an escalated fine and for the second time  
18 required Bosma to apply for a NPDES Permit. The enormous amount of  
19 animal wastes generated at these industrialized dairies are applied by  
20 various methods by dairy owners, operators, or their agents to crop  
21 fields which they own or lease. The animal waste is either spread on  
22 the fields by trucks or the animal wastewater collected in storage  
23 ponds is pumped through a hose to a "wheel line" or a center pivot  
24 irrigation line or a powerful "spray gun" and applied to the fields  
25 for crop production. If these appliances malfunction or are  
26 erroneously operated by the dairy employees, or if the animal wastes

1 are overapplied to the fields for crop production, the animal  
2 wastewater may run off the fields, in some cases discharging to waters  
3 of the United States.

4 At some point shortly after WADOE had again ordered Bosma Dairy  
5 to apply for a NPDES permit, an advisory committee composed of  
6 representatives of the Dairy industry, WADOE, and the EPA began  
7 working on the language to be included in the NPDES and Washington  
8 State General Dairy Permit. According to Robert Barwin, the water  
9 quality manager for WADOE in the central region of the state since  
10 1989, in an effort to develop cooperation and reach consensus on the  
11 permit language, WADOE did not require Bosma or any CAFO to apply for  
12 and did not issue to any CAFO a general NPDES permit during the years  
13 of the development of the NPDES and Washington State General Dairy  
14 Permit for Washington dairies. It was not until 1994, some eight  
15 years after WADOE first ordered Bosma to apply for a NPDES permit,  
16 that the language of the NPDES and Washington State General Dairy  
17 Permit was adopted. During those intervening years, WADOE recognized  
18 that the absence of a NPDES permit in Washington did not allow CAFOs  
19 like Bosma Dairy to violate the CWA by discharging animal wastes to  
20 the waters of the United States. When WADOE received and verified  
21 complaints of discharge violations by dairy operators in the Yakima  
22 area, it referred the dairy operator to the South Yakima Conservation  
23 District (hereinafter SYCD) for technical assistance to enable the  
24 dairy operator to avoid future discharge violations. As long as the  
25 dairy operator was actively engaged in using that technical assistance  
26 to correct the problem that led to the discharge violation, WADOE

1 would not prosecute the dairy operator to any penalty or formal  
2 enforcement.

3 In 1993, there were additional verified discharges of animal  
4 wastes to J.D. 26.6 on September 30 and October 1 . WADOE issued a  
5 Notice of Violation to Bosma for these violations. The imposition of  
6 a monetary penalty was appealed by Bosma to the Pollution Hearing  
7 Control Board of the State of Washington which heard the matter in May  
8 and June of 1995, and issued its decision in October of 1995. The  
9 penalty assessed in the sum of \$3,000.00 was sustained; the remaining  
10 \$3,000.00 of the penalty was suspended on condition that for three  
11 years after October of 1995, the activities at Liberty Dairy would  
12 cause no further water pollution violations or violations of the DWMP  
13 then in effect.

14 On April 22 and April 23, 1996, WADOE verified additional  
15 discharges to J.D. 26.6 by Bosma. WADOE issued Bosma a penalty order  
16 in the amount of \$9,000.00 for these additional verified wastewater  
17 discharges to J.D. 26.6. In addition, on July 30, 1996, WADOE sent  
18 Bosma a letter notifying him that he was required to file an  
19 application for a NPDES permit. The reasons for this notice were  
20 contained in the letter. Referring to the April 22, 1996, discharge,  
21 WADOE wrote the following:

22 This incident is similar in nature to other confirmed  
23 discharges of manure contaminated waters from the dairy  
24 which have periodically occurred since 1976. Due to the  
25 close proximity of Drain 26.6 to corrals, pastures, spray  
26 fields, feed alleys, and parlors at the Bosma Dairy and to  
the fact that the drain is used to convey contaminated  
wastewaters to ponds south of Kirks Road, discharges of  
manure contaminated wastewaters to waters of the state are  
likely to reoccur in the future.

1 (Ex. 48.) On December 13, 1996, Mr. Bosma requested relief from the  
2 penalty. Max Linden of WADOE verbally agreed with Bosma that the  
3 penalty would be held in abeyance "as long as Henry Bosma works on a  
4 management strategy and implements the BMP's (Best Management Plans)  
5 and management structures to prohibit manure from being conveyed by  
6 the drain through is [sic] dairy into the waters of the State." (Ex.  
7 90.) As directed by Linden, Bosma consulted with Laurie Crowe at the  
8 South Yakima Conservation District for assistance in developing the  
9 waste management plan.

10 In late 1996, as required by WADOE, Bosma applied for a NPDES  
11 permit for the Bosma Dairy. The H & S Bosma Dairy obtained a  
12 Washington general dairy permit on January 31, 1997.

13 On January 13, 1997, there was an additional discharge by Bosma  
14 Dairy verified by WADOE.

15 In 1996 and 1997, Bosma implemented extensive site improvements  
16 in response to pressure from WADOE. In 1997, Bosma constructed a  
17 series of storage ponds along the east side of his property as well as  
18 Storage Ponds # 1 and # 2 south of Kirks Road. None of the storage  
19 ponds were designed by an engineer. Both a representative of the  
20 National Resource Conservation Service (NRCS) and Ms. Crowe of the  
21 SYCD visited the site on occasion during the construction.

22 On April 17, 1997, Steven Butler who lives on N. Liberty Road  
23 south of Kirks Road reported that the pipe on the Canal from Bosma's  
24 property was spilling green-brown manure water into the bottom of the  
25 dry Canal. Examining Exhibit 59, a March, 1997, photo of manure in  
26 the Canal at that same location, Butler said that the amount in the

1 Canal from the April spill was much deeper, extending across the width  
2 of the Canal. He had seen this manure water running into the Canal  
3 for a couple of weeks before finally reporting it. He said the color  
4 of the water in Exhibit 43(c) was the color of the water he has seen  
5 flowing from that same pipe. On several occasions in 1998, and in the  
6 spring of 1999, he saw the same manure water spilling into the Canal  
7 at the pipe from Bosma's property.

8 Although now Bosma Dairy was operating with a NPDES permit, WADOE  
9 verified additional violations of discharges of pollutants into J.D.  
10 26.6 by Bosma Dairy on July 28, 1997, August 25, 1997, and September  
11 9, 1997. At least one of these violations involved overapplication of  
12 animal wastewater to the field east of Storage Ponds #1 and #2. WADOE  
13 records do not show any alleged violations after September, 1997.

14 In the winter months of 1997-1998, Ray Butler, who lives on N.  
15 Liberty Road south of Kirks Road near his son Steve, observed six-foot  
16 high mounds of frozen manure on the Bosma's field east of Storage  
17 Ponds #1 and #2 indicating the winter application of animal wastewater  
18 in violation of the NPDES/DWMP.

19 On October 31, 1997, as required by the CWA, 33 U.S.C. §  
20 1365(a)(1)(A), CARE sent Bosma its first Notice of Intent to Sue  
21 letter for violations of the CWA. Sometime after receiving this  
22 notice, Bosma and other dairy owners who had received similar Notices  
23 had a luncheon meeting at a restaurant with Robert Barwin, the WADOE  
24 water quality program manager in the Central Washington region.  
25 During this meeting, the Dairy owners and operators requested that  
26 WADOE take formal enforcement action against them which they believed



1 would prevent continuation of the suits by CARE. 33 U.S.C. §  
2 1365(b)(1)(B). Barwin testified that he declined to do so because  
3 WADOE had made a policy decision that it was going to allocate its  
4 enforcement resources in accordance with priorities it had set and  
5 would not respond in any way to the filing of citizen suits. In  
6 short, if the claims in the citizens' Notices of Intent to Sue  
7 involved WADOE enforcement priorities, then WADOE would take action;  
8 if not, it would not initiate any action. Barwin explained that until  
9 the 1998 amendments to the State Water Quality Act, WADOE lacked the  
10 resources to be proactive.

11 On November 11, 1997, Bosma applied for a NPDES permit for the  
12 Liberty Dairy. WADOE had advised Bosma in its July, 1996 Notice that  
13 one permit could be used for both dairies since they were adjoining  
14 and used some of the same waste management systems if they were under  
15 joint ownership.

16 In a December 23, 1997, letter to Max Linden of WADOE, Bosma  
17 wrote: "Also, I need some protection on the November NOV - say  
18 \$1,000?" (Ex. 95.) This was an effort by Bosma to reach agreement on  
19 a specific penalty assessment for the 1997 Notice of Violations. Also  
20 in December of 1997, Bosma submitted a Dairy Waste Management Plan for  
21 both dairies for approval. On January 15, 1998, the 60-day period  
22 having elapsed, CARE filed suit against Bosma. On that very date,  
23 quite coincidentally, WADOE issued a modification of the Bosma NPDES  
24 permit to include Liberty Dairy. (Ex. 318.)

25 In early 1998, Bosma visited the Reddout home. Helen Reddout  
26 tape-recorded their conversation. While the Court admitted into

1 evidence the tape and a transcript of it, holding the Defendant had  
2 waived objection by offering portions of the tape at the pre-trial  
3 conference, the Court has made no use of that evidence. ( See Exs. 346  
4 & 346A).

5 On January 16, 1998, Holly Cushman of WADOE issued a  
6 Recommendation for Enforcement Action against Bosma for the 1997  
7 violations. (Ex. 100.) It contained a history of violations which  
8 occurred in 1997, contacts with Bosma and a recommendation for the  
9 affirmation of the \$9,000.00 penalty for the 1996 violations which had  
10 been held in abeyance and the imposition of a total of \$3,000.00 for  
11 the failure of Bosma to report to WADOE the three verified 1997  
12 violations as required by his NPDES permit. There was no evidence of  
13 WADOE action on this recommendation.

14 The DWMP was approved by the NRCS, the SYCD and Bosma in February  
15 of 1998. As approved by Bosma, NRCS and SYCD, the DWMP contained this  
16 statement on page 13:

17 To be completed:

18 1. Currently, wastewater from the vehicle wash area is piped  
19 to the SVID drain. This wastewater will be diverted to one  
20 of the existing ponds or "catch basins" and the existing  
pipe to the drain will be capped off.

21 In May of 1998, several months after this suit was filed on  
22 January 15, 1998, Bosma employees deposited truck loads of manure  
23 produced at the Dairies to the Price/Kellum location where it sat for  
24 about a month before it was disked into the soil. As deposited, it  
25 was spread over a wide area on the property along the side of Price  
26 Road with some mounds four feet in height . Some of the liquid

1 material seen along the side of Price Road was leachate from this huge  
2 expanse of manure. Both in amount and location, the manure was threat  
3 to discharge to any streams close by. Based on photographs and a  
4 video taken by Helen Reddout during the time the manure was sitting in  
5 these deposits, there was water running under the bridge on Price Road  
6 across this property southwest to and under a bridge on Kellum Road.

7 In the summer of 1998, Bosma completed the installation of two  
8 pipes running under Kirks Road which connected the storage ponds above  
9 Kirks Road with Storage Ponds # 1 and # 2 south of Kirks Road. There  
10 was no blowout of the embankment of the pond above Kirks Road.

11 During the summer of 1998, and again in the spring of 1999,  
12 animal wastewater was sprayed on the field which was identified  
13 throughout the trial as the "14.3 acre field." This 14.3 acre field  
14 sits west of J.D. 26.6, and on its eastern edge the land slopes down  
15 to the J.D. 26.6. The animal wastewater from the wheel line on the  
16 14.3 acre field was sprayed onto Kirks Road and the Golob property on  
17 the south side of Kirks Road. Both Ray and Steve Butler, father and  
18 son, who live on Liberty Road, south of Kirks Road, observed this.  
19 The 14.3 acre field was not bermed and piped to Storage Pond # 2 until  
20 late Spring of 1999.

21 In the fall of 1998, Bosma contacted Harold Porath, a former  
22 Dairy Waste Inspector for WADOE, who was then employed by an  
23 engineering firm, and asked him to review the DWMP and evaluate the  
24 dairy facilities. Porath indicated in an October 12, 1998, letter to  
25 Bosma that he had completed the requested evaluation of Wastewater  
26 Control Facilities on the Dairies owned by Bosma in Zillah,

1 Washington. (Ex. 146.) That review included Dairy site visits, a  
2 review of the NPDES General Permit for both dairies, a review of the  
3 Waste Management Plan written by the Natural Resources Conversation  
4 Services (NRCS) for both dairies, and discussions with representatives  
5 of NRCS regarding the Waste Management Plan. Porath noted that flow  
6 from the hop yard to the west of Liberty Road flows to a drain on the  
7 west side of Liberty Road and runs east under the road to an open  
8 ditch through the middle of a pasture on the Bosma Dairy in proximity  
9 to the cow pens. Paragraph 5 of that letter states,

10       Runoff from the hop yard located south of the Liberty Dairy  
11       and west of the Hank Bosma Dairy currently flows east under  
12       Liberty Road, across the pasture on the Hank Bosma Dairy and  
13       enters Drain 26.6. Since this runoff flows in an open drain  
14       across the pasture on the Hank Bosma Dairy, waste materials  
15       applied to the pasture or escaping from the pens located  
16       south of the pasture have the potential to commingle with  
17       the hop yard runoff and be discharged into Drain 26.6.

18 (Ex. 146.)

19       This is similar to the statement found in the dictation based on  
20 field notes made by Porath on his September 16, 1998, site visit. (Ex.  
21 147.) The Court notes that Porath also wrote in his dictated field  
22 notes, "[a]ccording to Lauri Crowe, South Yakima Conservation District  
23 Dairy Waste Resource Technician, neither the Conservation District nor  
24 the NRCS designed the new facilities on the HB Dairy and that facility  
25 construction was done without cost-share from NRCS." Porath also  
26 indicated that he was going to meet with Lauri Crowe at the end of  
September to review the DWMP. Certain revisions were made to the DWMP  
in October of 1998, by Lauri Crowe after her meeting with Porath.

1 Those revisions did not contain any amendments, revisions or  
2 corrections to page 13 of the DWMP dealing with the truck wash.

3 In January of 1999, the John Monks, a hydrogeologist, and Alan  
4 Gay, a civil and environmental engineer, experts consulting with CARE,  
5 along with Kevin Freeman, a hydrogeologist, an expert consulting with  
6 Bosma, and Harold Porath, as well as several members of CARE, and  
7 attorneys for both parties visited the Dairies to conduct discovery.  
8 During these site visits, Mr. Freeman took certain measurements of the  
9 lagoons. Gay and Freeman walked J.D. 26.6 on the Bosma property and  
10 took water samples. Gay and Freeman did some bucket tests to  
11 determine rate of flow. The embankments of the storage pond above  
12 Kirks Road and those south of Kirks Road were observed, as was the  
13 land on the west side of J.D. 26.6 north of the Canal. In January,  
14 the storage ponds would contain a large amount of animal wastewaters  
15 since application to frozen fields in winter months is prohibited by  
16 the DWMP. No seepage or evidence of seepage from the storage ponds  
17 was observed by any person or expert. There was no credible evidence  
18 of erosion of the embankments of the storage ponds observed by any  
19 person or expert. Various photos were taken by different individuals  
20 during those site visits.

21 Wastewater samples were taken at four different sites within J.D.  
22 26.6. The first location was the pipe above Kirks Road near the Cow  
23 Palace outfall. The next locations were opposite the north and south  
24 ends of Pond #2. The final sample was taken from the flume or weir  
25 box opposite Pond #1. The water samples were tested for fecal  
26 coliform, nitrates, ortho-phosphates, total phosphates, ammonia,

1 chloride, conductivity, kjeldahl nitrogen, and nitrite. The results  
2 of the water sampling indicate the concentrations of all constituents  
3 except for ortho-phosphate, total phosphate and fecal coliforms are  
4 consistent over the investigated length of 26.6. Elevated fecal  
5 coliform existed during both site visits in the reach adjacent to the  
6 lowest lagoons but not above those lagoons. The fecal levels adjacent  
7 to and below the lagoons were consistently above the state standards  
8 of 100mL/100 colonies. Detected concentrations of orth-phosphate and  
9 total phosphate elevated in the reach adjacent to Pond #1.

10 In March of 1999, Richard Haapala, an expert in agricultural  
11 engineering, visited the Dairies to consult with Bosma. In April of  
12 1999, Philip Small, an expert in soils sampling and analysis, also  
13 visited the Bosma property to consult with Bosma.

14 All of these experts testified at trial regarding CARE's claim  
15 that Storage Ponds # 1 and # 2 were leaking into J.D. 26.6. and the  
16 claim that these same storage ponds lacked capacity to comply with the  
17 storage requirements of the DWMP and the CWA in that they could not  
18 contain the required wastes in the event of a 25-year, 24-hour storm  
19 event. Essentially these are claims that there are continuing  
20 violations of the CWA/NPDES permit or the likelihood of continuing  
21 violations related to these storage ponds.

22 The Court has in mind the testimony of the witnesses, its review  
23 of the exhibits, its determination of the credibility of the  
24 witnesses, and the facts as found above and elsewhere herein.

25 ///

26 ///

1 **B. Continuing Violations**

2 **1. Truck Wash**

3 The Court finds that on January 15, 1998, there was evidence of  
4 continuing violation of the CWA due to discharges of wastewater from  
5 the truck wash to J.D. 26.6. In 1998, DWMP contained the following  
6 paragraph:

7 To be completed:

8 1. Currently, wastewater from the vehicle wash area  
9 is piped to the SVID drain. This wastewater will be  
10 diverted to one of the existing ponds or "catch basins"  
and the existing pipe to the drain will be capped off."

11 (Ex. 97 p. 13)

12 The Court finds that, even assuming that the drain was capped in  
13 March of 1998 as Bosma testified, as of January 15, 1998, the date the  
14 Complaint was filed, this condition was a continuing violation of the  
15 NPDES permit and of the CWA. However, the Court finds it is probable  
16 that if this condition had been corrected as of March of 1998, Bosma  
17 would have told Porath whom he hired specifically to review the DWMP  
18 *which contained page 13 and this condition to be corrected* . Further,  
19 the Court finds that Porath, who was retained in September of 1998,  
20 and reviewed both the DWMP and the facilities as requested by Bosma,  
21 would have told Crowe about the truck wash when he pointed out certain  
22 errors in the DWMP, had he been told of this correction of the  
23 condition of the truck wash. In fact, Crowe issued revisions to those  
24 pages which needed correction but none were issued for or as to the  
25 condition of the truck wash drain which needed to be corrected. Bosma  
26 introduced no evidence to support his statement that the truck wash

1 drain was capped in March of 1998. At Bosma's request in May of 1999,  
2 just before trial, Crowe issued a revision to this page with a  
3 parenthetical added, "(completed in March of 1998)." Crowe relied on  
4 Bosma's assertion and did not confirm it independently.

## 5 **2. Misapplication/Overapplication of Wastewaters**

6 The Court further finds that as of January 15, 1998, there was  
7 the likelihood of continuing discharges to J.D. 26.6 and therefore  
8 violations of the CWA due to the likelihood of the misapplication or  
9 overapplication of animal wastewaters to the 14.3 acre field which  
10 would flow down the slope east into J.D. 26.6. This field was not  
11 bermed and piped to the southern storage ponds until the late spring  
12 of 1999 before trial. When the Court conducted a view of the Dairies  
13 in late May of 1999, just before trial, the field looked recently  
14 bermed and graded to the center of its eastern edge to a pipe in the  
15 slope. The testimony of both Butlers who live on adjacent property  
16 and have traveled the area along Kirks Road and N. Liberty Road every  
17 day for some 20 years was persuasive to this Court that manure  
18 wastewater was being applied to the 14.3 acre field and onto adjacent  
19 roads and property.

## 20 **3. Operation and Maintenance**

21 The Court also finds that the long history of a variety of  
22 repeated violations of the CWA by Bosma resulting from discharges to  
23 J.D. 26.6 and the Canal makes it likely that there will be  
24 intermittent discharges to J.D. 26.6 and the Canal due to the  
25 operation and maintenance of the Dairies. This finding is bolstered  
26 by, but does not solely depend on, the testimony of Helen Reddout and



1 the photos and video of the deposits of four foot mounds of manure  
2 along the side Price Road and in proximity to water running under both  
3 the Price Road and Kellum Road bridges and through the Price/Kellum  
4 leased property. To deposit such quantities of manure in such a  
5 location with the potential to discharge to waters of the United  
6 States, just four months after being sued for CWA violations, is  
7 evidence that Bosma was not operating and maintaining the facilities  
8 according to the requirement of the CWA nor managing waste as required  
9 by his DWMP.

10 This court allowed evidence of the this incident at the  
11 Price/Kellum Road property when it became clear during trial that this  
12 property was part of the DWMP and used for application of wastes  
13 produced at the Dairies some four miles away. It was then relevant to  
14 the issue of whether there was a continued likelihood of discharge  
15 violations due to the operation and maintenance of these Dairies. The  
16 Court refused to permit CARE to include this as a claimed violation  
17 without amending its Complaint. Nothing in the Notice of Claim would  
18 have put the recipients on notice of any violation at the Price/Kellum  
19 Road location because it was not identified in the Notice as a site of  
20 prior discharges nor was this incident sufficiently similar to the  
21 claims contained in the Notice to permit its inclusion in this case  
22 absent a motion to amend. CARE did send a supplemental Notice of this  
23 claim to Bosma but never moved to amend its complaint to include this  
24 incident.

25 ///

1           **4. Liberty Dairy - Operation without a NPDES Permit**

2           CARE claims that Liberty Dairy was in continued violation of the  
3 CWA because it was a CAFO and did not have a NPDES permit on the date  
4 of the filing of the complaint, January 15, 1998. The evidence shows  
5 otherwise. On that very same date, WADOE issued a modification of the  
6 NPDES permit to include Liberty Dairy as Bosma had requested in late  
7 1997. Therefore, as of January 15, 1998, Liberty Dairy had a NPDES  
8 permit and was not in continuing violation of the CWA. In Washington,  
9 a citizen may not bring suit under the CWA for 60 days after the  
10 citizen gives Notice of Intent to Sue to the Administrator of the EPA,  
11 WADOE and the alleged violator. See 33 U.S.C. 1365(b). One of the  
12 purposes of this sixty-day waiting period is to give the alleged  
13 violator "an opportunity to bring itself into compliance with the Act  
14 and thus likewise render unnecessary a citizen suit." *Gwaltney*, 484  
15 U.S. at 60. With regard to this claim, Bosma was in compliance with  
16 the CWA on the date of the filing of the complaint and therefore,  
17 there was no continuing violation nor a likelihood of a continuing  
18 violation.

19           **5. Storage Ponds and Lagoons**

20               **a. Seepage to J.D. 26.6**

21           The soil of the area of the Dairies has been studied and its  
22 porosity is considered "severe." (Ex. 138). Because of its porosity,  
23 the soil needs to be compacted to 10<sup>7</sup> for use in storage ponds. CARE  
24 uses the porosity of the soil as one of its bases for claiming the  
25 seepage of animal wastewater from Storage Ponds #1 and #2. CARE also  
26 points out that there is no evidence that a professional engineer

1 reviewed and approved the construction plans for these two ponds.  
2 Various tests were performed by experts for both parties during and  
3 after the site visits of January, 1999. Gay and Freeman had the water  
4 samples taken from J.D. 26.6 analyzed by the same laboratory, although  
5 Freeman had a more extensive test done. Using the same water samples  
6 and laboratory they came to different conclusions based on those  
7 results, observations during the site visits and review of various  
8 materials. Gay relied on the fecal coliform, phosphate and ortho-  
9 phosphate results to support his theory that the storage ponds were  
10 seeping underground to J.D. 26.6 via macropores or "piping." Freeman  
11 compared the fecal coliform results to the other results, specifically  
12 the chloride results, and concluded the ponds were not the source of  
13 the fecal coliform in J.D. 26.6. In sum, the presence of chloride was  
14 essentially uniform at all four test locations. Freeman opined that  
15 given the character of chloride to freely travel, had there been  
16 underground seepage from Storage Ponds # 1 and # 2, there would have  
17 been increased amounts of chloride at the testing locations in J.D.  
18 26.6 parallel to those ponds. The analysis of the water samples did  
19 not demonstrate that.

20 Mr. Freeman also conducted a "bucket test" as a rough field test  
21 for the flow rate of J.D. 26.6 at several locations and concluded that  
22 there was no appreciable difference in flow rate at different points  
23 in J.D. 26.6. Philip Small, an expert on soils analysis, walked the  
24 length of J.D. 26.6 at the Dairies observing the ponds and catch  
25 basins' embankments. He probed the exterior walls of the embankments  
26 of Storage Ponds # 1 and # 2 and Catch Basin 1 north of Kirks Road

1 with a 1/4 inch rod topped with a 3/8 inch ceramic ball to see if  
2 there was any collapse or breakthrough of the soil which would  
3 indicate "piping." He found none. Monks used a Global Positioning  
4 System device to measure the area of the storage ponds and the surface  
5 area of those ponds. Some tests, like a dye test, were not performed  
6 by CARE due to the length of time to conduct such tests and the  
7 expense.

8 In addition, there is no evidence critical of the construction of  
9 these storage ponds. The uncontradicted testimony of Bosma is that  
10 representatives of both NRCS and the SYCD visited during construction.  
11 Laurie Crowe of the SYCD agreed that she saw nothing in the manner of  
12 construction that appeared to violate NRCS standards. Both  
13 organizations signed and approved the 1998 DWMP which specifically  
14 identified the enlargement of these ponds in Section 7, "ADDITIONAL  
15 IMPROVEMENTS." There was other uncontradicted testimony by Bosma that  
16 a person with years of experience in construction of storage ponds  
17 constructed the ponds. No expert who testified conducted any tests  
18 establishing the compaction of the soil in the embankments, assuming  
19 such tests exist. There is no evidence that WADOE or EPA required  
20 that a professional engineer design these storage ponds. There is  
21 also no evidence that Bosma did not comply with standards that did  
22 apply to the design and construction of these storage ponds.  
23 Parenthetically, there is no evidence that any government health  
24 agency was required to approve the design, location, or construction  
25 of these storage ponds. Based on the porosity of the soils at the  
26 Dairies, CARE's experts questioned their suitability for use in

1 constructing these storage ponds. However, absent tests confirming  
2 the lack of appropriate compaction of soils in the embankments and  
3 absent any evidence of the violation of any applicable construction  
4 standards, and given the conflicting expert conclusions based upon the  
5 analyses of the water samples, as well as the approval of the DWMP by  
6 both the NRCS and the SYCD, the evidence is simply insufficient to  
7 prove to a reasonable probability that the storage ponds were the  
8 source of the fecal coliform in J.D. 26.6 at the time of the water  
9 quality sampling in January of 1999, or that they will be in the  
10 future.

11 **b. Capacity of Storage Ponds**

12 CARE claims the capacity of storage ponds of the Dairies is  
13 insufficient to withstand a 25-year, 24-hour storm event as required  
14 by 40 C.F.R. § 412.13(b). This guideline requires a CAFO to be  
15 designed, constructed, and operated to contain all process generated  
16 wastewaters plus the runoff from a 25-year, 24-hour rainfall event.  
17 CARE argues that the DWMP incorrectly used 1.6 inches of rain for a  
18 25-year, 24-hour storm event and that the correct figure is actually  
19 2.5 inches based on calculations testified to by Alan Gay. Alan Gay,  
20 using his calculations and those of Kevin Freeman, concluded that the  
21 storage capacity of the Dairies was inadequate. Ms. Crowe of the SYCD  
22 who prepared the DWMP obtained the figure of 1.6 inches from the  
23 Prosser Resource Station. That is the same figure used by the NRCS  
24 maps for rainfall at the Dairies. Ms. Crowe also testified that she  
25 used the T55 NRCS software program which is the standard program to be  
26 used for these capacity calculations and that based on these

1 calculations, the Dairies have adequate capacity to withstand a  
2 25-year, 24-hour storm event. Alan Gay overestimated the acreage of  
3 the Dairies which would contribute water to the storage ponds. Based  
4 on the evidence, the Court finds that CARE has failed to prove that  
5 the Dairies lack the storage capacity to contain a 25-year, 24-hour  
6 storm event. Accordingly, CARE has failed to prove a continuing  
7 violation or the likelihood of a continuing violation on this claim.

## 8 V. CONCLUSIONS OF LAW

### 9 A. The Washington Dairy Nutrient Management Act of 1998

10 Bosma believes that this act provides him with immunity from  
11 citizen suits provided he has a NPDES permit and a Dairy Waste  
12 Management Plan and is in compliance with both. This position is set  
13 out in the Defendant's Trial Brief (Ct. Rec. 159). The Washington  
14 statute provides:

15 This section specifically acknowledges that if a holder of a  
16 general or individual national pollutant discharge  
17 elimination system permit complies with the permit and the  
18 Dairy Nutrient Management Plan's conditions for appropriate  
19 land application practices, the permit provides compliance  
with the Federal Clean Water Act and acts as a shield  
against citizen or agency enforcement for any additions of  
pollutants to waters of the state or of the United States as  
authorized by the permit.

20 WASH. REV. CODE § 90.64.030(8)(1990).

21 Neither party has briefed this matter with an analysis of the  
22 legislative history, comparable state statutes, comparable statutes  
23 from other states, or an analysis of federal precedents dealing with  
24 similar state statutes. The Court expresses no opinion on legal  
25 efficacy of this statute as a defense to a CWA claim. It is  
26 sufficient to say that this Court finds that Bosma was not in

1 compliance with his Dairy Waste Management Plan nor with the NPDES  
2 Permit. On its very face, the DWMP clearly indicates, on page 13,  
3 that wastewater from the truck wash is being discharged to J.D. 26.6.  
4 Additionally, the deposits of a four-foot high bed of manure along  
5 Price Road in May of 1998, and the misapplication of animal wastewater  
6 to the 14.3 acre field causing the discharge to J.D. 26.6 in 1998 and  
7 1999, have been proven by a preponderance of the evidence. While  
8 Bosma may have possessed a NPDES permit and a DWMP, he was not in  
9 compliance with them. With these facts, there is no interpretation of  
10 that subsection, whatever its legal efficacy, which would shield Mr.  
11 Bosma from a citizens suit for violations of the CWA. Bosma is a CAFO  
12 and a CAFO may not discharge except as a result of a 25 year, 24-hour  
13 storm event.

#### 14 **B. Violations**

15 To establish a violation of the CWA, Plaintiffs bear the burden  
16 of proving that (1) Defendants are "person[s]," (2) who "discharged"  
17 or "added," (3) a "pollutant," (4) from a "point source," (5) into  
18 "waters of the United States," (6) and the discharge was not  
19 authorized by a NPDES permit. See 33 U.S.C. §§ 1311(a) & 1342;  
20 *Committee to Save Mokelumne River v. East Bay Util. Dist.*, 13 F.3d  
21 305, 308 (9th Cir. 1993) (listing and discussing elements).

22 CARE proved Defendants are persons who discharged pollutants  
23 (wastewater and manure) from a point source (CAFO, spray guns, truck  
24 wash, wheel lines, and other discrete conveyances) into waters of the  
25 United States (J.D. 26.6) in violation of their NPDES permit.

26 ///

1           **1. Proven Violations**

2           Based on the testimony of Harold Porath, Robert Barwin, Max  
3 Linden, Greg Schuler, James Trull, Holly Cushman, Ray Latham, Henry  
4 Bosma, Laurie Crowe, Ray Butler, Steven Butler, Michael Tedin;  
5 deposition testimony of Ronald Shuck; Bosma's Response to Plaintiff's  
6 First Request for Admissions (Ex. 117); and exhibits admitted prior to  
7 and during trial, the Court finds the following violations occurred  
8 for which Defendants are strictly liable:

9   1. September 30, 1993 : Bosma admitted they discharged manure  
10 wastewater from the sprayfield into J.D. 26.6 because procedures  
11 designed to prevent overapplication failed due to an employee leaving  
12 work early to attend to a family emergency without shutting equipment  
13 off. (Exs. 24-27, 29-38, 41-42, 152.)

14   2. October 1, 1993 : Same event continuing as September 30, 1993.  
15 *Id.*

16   3. December 1, 1993 : Bosma admitted a discharge of wastewater into  
17 J.D. 26.6. (Ex. 117, ¶ 29.)

18   4. January 20, 1995 : Upon investigation of a January 17, 1995,  
19 complaint of violation, WADOE employee McKinney personally observed a  
20 leaking sprinkler line discharging wastewater into J.D. 26.6. (Ex.  
21 40.)

22   5. April 22, 1996 : Bosma admitted and WADOE verified after a  
23 complaint received on April 19, 1996, that a manure wastewater  
24 discharge into J.D. 26.6 occurred because an employee failed to switch  
25 the valve transfer ditch to check runoff from pasture of application.  
26 (Exs. 43-48; 117, ¶ 39; 100.)



1 6. April 23, 1996 : Bosma admitted they overapplied manure waste to  
2 agricultural land which resulted in a discharge of manure waste in  
3 J.D. 26.6. (Ex. 117, ¶ 40.)

4 7. January 13, 1997 : Bosma admitted and WADOE verified after receipt  
5 of a complaint that a discharge of manure wastewater into J.D. 26.6  
6 occurred because of a breach in a new, unfinished lagoon that was  
7 under construction. (Exs. 50; 52-53; 117, ¶ 42.)

8 8. April 17, 1997 : Steven Butler testified that he reported a  
9 discharge to WADOE. Specifically, he stated that the pipe on the  
10 Canal from Bosma's property was spilling green-brown manure water into  
11 the bottom of the dry Canal. WADOE did not investigate the claim.

12 9. April 17, 1997 : Defendant violated Condition S5.B. of the  
13 general dairy permit by not reporting the discharge to WADOE.

14 10. July 28, 1997 : After receiving a complaint, WADOE employee Ray  
15 Latham personally observed and verified that overapplication of  
16 irrigation runoff contaminated with manure had eroded an area between  
17 the lagoon and SVID canal. The runoff was bypassing the lagoon and  
18 entering J.D. 26.6. (Exs. 73, 74, 90, 94, 100.)

19 11. July 28, 1997 : Bosma violated Condition S5.B. of the general  
20 dairy permit by not reporting the discharge to WADOE. (Ex. 100.)

21 12. August 25, 1997 : Bosma admitted, and after receipt of a  
22 complaint WADOE verified, that a pipe to the newest lagoon was  
23 plugged, resulting in contaminated wastewater discharging into J.D.  
24 26.6. (Exs. 79; 80; 81; 90-91; 93; 100; 117, ¶ 73.)

25 13. August 25, 1997 : Bosma violated Condition S5.B. of the general  
26 dairy permit by not reporting the discharge to WADOE. (Ex. 100.)

1 14. September 9, 1997: Bosma admitted, and after receipt of a  
2 complaint WADOE verified, that a piece of sheet metal was blocking the  
3 intake to the lower lagoon and diverting contaminated wastewater to  
4 J.D. 26.6. (Exs. 82-89; 90-91; 100; 117, ¶ 73.) WADOE employees  
5 collected samples of liquids flowing in J.D. 26.6 below the discharge  
6 location which indicated fecal coliform levels were greater than  
7 48,000/100mL.

8 15. September 9, 1997: Bosma violated Condition S5.B. of the general  
9 dairy permit by not reporting the discharge to WADOE. (Ex. 100.)

## 10 **2. Alleged Violations Not Proven**

11 The Court heard testimony regarding the following dates for which  
12 the Plaintiff failed to meet its burden of proof sufficient to  
13 establish violations: March 26, 1993; March 31, 1993; June 9, 1993;  
14 January 17, 1995; April 19-21, 1996; January 14-16, 1997; January 23,  
15 1997; February 24-25, 1997; March 3-4, 14-16, 21-23, 28-30, 1997;  
16 April 4-6, 11-13, 17, 1997; May 27, 1997; June 23, 1997; July 25-27,  
17 1997; August 1, 1997; unspecified dates in August and September, 1998.

## 18 **C. Conclusion**

19 Bosma is strictly liable for fifteen violations of the CWA. CARE  
20 has proven that Bosma continues to violate the CWA and that there is a  
21 likelihood that there will be recurrent violations at the Bosma  
22 Dairies.

23 The trial on penalties will be held on a date in the fall of this  
24 year to be determined in a scheduling conference call with counsel.

25 ///

1       **IT IS SO ORDERED.**   The District Court Executive is directed to  
2 enter this order and to provide copies to counsel.

3       **DATED** this 29th day of July, 1999.

4  
5                                       /s/ Edward F. Shea  
6                                       EDWARD F. SHEA  
7                                       United States District Judge  
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